IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

APPEAL NO.1466 OF 1996
IN
ARBITRATION PETITION NO.143 OF 1992
IN
AWARD NO.218 OF 1991
IN
ARBITRATION SUIT NO.1315 OF 1987

ATV Projects India Ltd., a
Company registered under the
Companies Act, 1956 having its
registered office at D-8, MIDC Marol,
Andheri (East), Bombay-400092 .. Appellants

v/s.

Walchandnagar Industries Ltd.,
a Company registered under the
Companies Act, 1956, having its
registered office at Construction
House, Walchand Hirachand Marg,
Bombay-400 038. .. respondents

Mr.K.R.Bulchandani with Mr.Gaurav Agarwal i/by M/s.Law Global for the appellants.

Mr.H.J.Thakkar, Senior Counsel with Ms.S.V.Sonawane i/by Ms.S.V.Sonawane for the respondents.

CORAM : R.M. LODHA &
ANOOP V.MOHTA, JJ.

DATED : 24TH FEBRUARY, 2006.

P.C.

This appeal is directed against the judgment dated 5/6th April, 1995

passed by the learned Single Judge in Arbitration Petition No.143 of 1992 whereby he refused to set aside the award dated 23rd December, 1991 in entirety in respect of the escalation cost and award of interest.

2. On 12.8.1983, the parties entered into the agreement for the purpose of executing a contract to design, manufacture, procure and supply on ex-works basis machinery and equipments for boiler plant and centrifugal station for a sugar plant. The dispute arose between the parties and ultimately in the arbitration suit filed under the Arbitration Act, 1940, the parties agreed that all the disputes and claims between them arising out of the agreement including the question whether any party is entitled to receive any amount from the other be referred to the sole arbitration of Mr.C.T.Dighe, retired High Court Judge. Consequent upon the said agreement, the arbitration suit was disposed of on 19th February, 1988 and Mr.C.T.Dighe, former Judge of this court was appointed as the Arbitrator.

3. The present respondents- Walchandnagar Industries Limited (hereinafter to be referred as `the claimants' for the sake of convenience) filed the statement of claim before the Arbitrator. The present appellants (hereinafter to be referred as `the respondents') filed the reply as well as counter-claim. None of the parties led oral evidence. On the basis of the material on record and after hearing the parties, the Arbitrator passed the award on 23rd December, 1991 declaring that the performance bank guarantee dated 27th July, 1984 in the sum of Rs.10,25,000/- has ceased to be valid and operative and that the respondents should return the same to the claimants. The Arbitrator also directed the respondents to pay to the to the claimants the sum of Rs.4,22,388.35 as escalation charges,

Rs.13,17,985.18 as interest charges and Rs.10249/- for validating bank guarantee. Rest of the monetary claim made by the claimants was rejected by the Arbitrator. The Arbitrator awarded interest at the rate of 18% per annum from 1.4.1988 until realisation upon the awarded amount and also quantified the cost of Rs.40,000/- payable by the respondents to the claimants.

4. The respondents by filing petition prayed for setting aside the award dated 23rd December, 1991. The award was challenged on four grounds; (i) escalation costs; (ii) interest; (iii) validity of performance guarantee; (iv) charges for keeping the bank guarantee alive and of cost.

5. After hearing the parties, the learned Single Judge accepted the contention of the respondents that the award of interest for the first 90 days on delayed payment of bills was contrary to the agreement and to that extent, there being an error apparent on the face of the record, he accordingly, set aside the award of interest on delayed payment of bills. Rest of the award was sustained. Aggrieved thereby, the respondents are in appeal.

6. Mr.K.R.Bulchandani, the learned counsel for the original respondents (appellants herein) raised two-fold contention before us. His first contention is that the award of escalation cost is bad-in-law. The other contention is that the interest awarded on delayed payment beyond 90 days suffers from serious illegality and so also the award of interest at the rate of 18% per annum from the date of the award.

7. Mr.H.J.Thakkar, the learned senior counsel for the claimants supported the judgment of the learned Single Judge.

8. Dealing with the first question regarding escalation cost, we may straight way observe even if the parties waived delay on the part of each other, the award of the escalation cost cannot be said to be unjustified. The award of escalation cost was not on the basis of any default on the part of the respondents. The Arbitrator in his award has given reasons for award of escalation cost. In this connection, the Arbitrator considered clauses 3.7, 12.1.6, 12.3 of the agreement and then looked into the substituted Annexure-I, Statement -A, Statement-B and Statement-C. On consideration of these statements, in paragraph 65 of the award, the Arbitrator observed thus-

> "65. A look at the statement of Annexure I in the amended form would show that revision was necessary by reason of the bills dated 31st March, 1985 Sugar escalation Rs.94,802/- and smaller amounts elsewhere. There is further adjustment by reason of the minutes of the meeting between the parties in May, 1986. Although the respondents therefore have denied the escalation charges, I am not in a position to gather any error in either making the bills or anything by way of irregular or incorrect adjustments."

9. Dealing with the argument of the respondents that no escalation charges would have been necessary if the schedule of supply given in the written contract was adhered to, the Arbitrator observed thus-

> "66. A case was made out that no escalation charges would have been necessary if the schedule of supply given in the written contract was adhered to. In the first place the argument is presumptuous. Even if supply were to be made in the scheduled period, there could have been variation in the price. No details are available to show that a particular item for which the bill is made was expected in a particular month and if supplied in that month there would not have been any escalation. The general impression is that prices have arisen up all along. Besides the contention noted above is not available to the respondents. It has already been noticed that delay in giving advance, delay in payments,

> delay in supply has taken place like a chain reaction and parties have acquisiced in it. Therefore no blame could be attached for delayed supply in this case. Consequently, the entire amount of Rs.22,388.28 has to be taken as due from the respondents to the claimants."

10. The learned counsel for the respondents submitted that while awarding the escalation charges, the Arbitrator also took into consideration the service charges which were not provided under the agreement. While dealing with this aspect and that the balance of Rs.4,22,388.35 were payable towards the escalation charges, the Arbitrator observed thus-

> "64. Statement `B' attached to this Annexure I gives datewise details of service charges totalling Rs.2,70,616/- out of which as Page 1 of summary shows Rs.1,44,415/- were credited. Rs.40,000/- were reduced in view of price reduction. There is further credit of Rs.4,965/- on advance account leaving a balance of Rs.81,235/- as service charges. Statement `C' to this annexure gives datewise debit notes for "other charges" totalling Rs.46,094.65 of which adjusted credit is Rs.41,941.30 and the balance comes to Rs.4,153. The same details Horizontally arranged are shown on the last page of this Annexure. From it we find that Rs.40,000/- are reduced from escalation charges as decided in the joint meeting dated 30th May, 1986. The statement shows a net balance of Rs.4,22,388.35. A clear cut case for the escalation charges is thus made out. Service charges and other debits have arisen because of the contract for supervision over erection. Under the agreement bills for material supplied were to be made separately therefore the other bills came to be noticed under this head."

11. The conclusion arrived at by the Arbitrator cannot be said to suffer from any error apparent on the face of the record and, therefore, the learned Single Judge did not err in overruling the objection raised by the respondents that escalation charges were not payable.

12. The second contention raised by the learned counsel for the

respondents is regarding the award of interest on the ground of delay. Mr.K.R.Bulchandani, the learned counsel for the appellants vehemently contended that the Arbitrator had no authority or jurisdiction to adjudicate upon the dispute regarding the interest as no bills were raised as contemplated under clause 12.1.16 and as this was not a dispute which was in existence on the date of reference, the award of interest on delayed advances was without jurisdiction. In support of his contention, Mr.Bulchandani relied upon few judgments viz., Wazir Chand Mahajan & another v. Union of India, AIR 1967 SC 990, K.V.Rajalakshmiah Setty and another v. State of Mysore and another, AIR 1967 SC 993, State of Orissa and another v. Sri Damodar Das, AIR 1996 SC 942, Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority, AIR 1988 SC 1007, State of Kerala and another v. K.Kurian P. Paul, AIR 1992 Kerala 180, Government of Kerala and another v. V.P.Jolly, AIR 1992 Kerala 187, M/s.Bombay Ammonia Pvt.Ltd. v. Union of India, AIR 1987 Delhi 148, The Fertilizer Corporation of India Ltd. v. M/s.Bharat Painters, AIR 1986 Orissa 82, M/s.Allen Berry and Co. Pvt.Ltd. v. The Union of India, AIR 1971 SC 696 and M/s.Sudarsan Trading Co. v. The Govt.of Kerala and another, AIR 1989 SC 890.

13. The order dated 19th February, 1988 whereby the disputes and claims between the parties were referred to the sole arbitration of Mr.C.T.Dighe, Retired High Court Judge reads thus-

> "1. Agreed that all the disputes and claims between the plaintiffs and the First Defendant arising out of or under the Agreement dated 20.5.85 including the question whether the First Defendants are entitled to receive any amounts from the Plaintiffs or vice-versa be referred to the sole arbitration

of the Hon'ble Mr.Dighe, Retired High Court Judge.

.....”

14. Clause 12.1.6 of the agreement reads thus-

“12.1.6 If the purchasers fail to open the L.C. Or make alternative financial arrangements for retiring documents through Bank or payment by Demand Draft within 90 (ninety) days from the due date of opening of Letter of Credit or fail to keep the letter of credit operating subsequently after opening the same during execution of the agreement for receiving materials equipments already inspected passed by Inspection Agency and kept ready for despatch or material kept ready for despatch to be inspected at the Purchasers plant site or materials already despatched the Sellers shall be entitled to payment of interest only at the prevailing bank rate on balance 75% of the value of such aforementioned materials/equipments after the expiry of ninety days from the scheduled date of despatch or the date of keeping material/equipment ready for despatch after being inspected and passed by the inspection agency, as the case may be, whichever is later, till such time financial arrangement is made by the Purchasers. During the first ninety days as aforementioned i.e. The period when no interest is payable by the Purchasers, escalation for the same period shall be paid by the Purchasers as per terms of the contract.

In such an event, the Sellers shall submit bill for interest separately after despatching the materials to site and after being inspected and passed by inspecting agency. The Purchasers shall pay interest within 30 days of receipt of bills. The Sellers shall provide all relevant records, documents before the purchasers/Inspection Agency and make necessary arrangements for their physical verification to establish that such materials/equipments have actually been kept

> ready for despatch. The sellers shall not be entitled to payment of any additional escalation and/or interest, if the Sellers divert the materials/equipments with or without written approval of the Purchasers.
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> The sellers shall not be entitled to payment of any escalation and/or interest if there is any delay in despatching the materials/equipments after the same is ready for despatch due to no fault of the purchasers."

15. Clause 12.1.6 provides for payment of interest at the prevailing bank rate. It provides that if the respondents fail to open the Letter of Credit or make alternative financial arrangement or fail to keep the Letter of Credit operative, the claimants shall be entitled to payment of interest at the prevailing bank rate on the balance 75% of the value of such materials/equipments after the expiry of 90 days from the scheduled date of dispatch or the date of keeping material/equipment ready for dispatch after being inspected and passed by the inspecting agency. However, during the first 90 days, no interest was payable by the respondents and only escalation for the same was payable as per the terms of contract. The claimants were to submit, in that event, the bill for interest separately after dispatching the material to site and the respondents were to pay interest within 30 days of receipt of the bills. It is an admitted position that on the date the reference was made to the Arbitrator, the bills of interest for delayed delivery were not raised and the said bills of interest were raised on 31st March, 1988. However, the question arises whether for want of such bills of interest having been raised prior to the date of reference, the Arbitrator had no jurisdiction to award interest for delay.

16. Firstly, we may notice that in the reply and counter-claim, the respondents have not objected to the Arbitrator's authority or jurisdiction to adjudicate upon the dispute concerning the award of interest for the delay. No plea in specific terms as was contended before us or raised before the learned Single Judge that the Arbitrator had no authority or jurisdiction to adjudicate upon the dispute regarding interest as this was not a dispute on the date of reference was made before the Arbitrator. In the reply and the counter-claim, the plea that was raised by the respondents was that the claimants have not submitted bills to the respondents for interest as required under clause 12.1.6 of the agreement. To say that the Arbitrator has no authority to adjudicate upon the dispute regarding interest as this was not a dispute in existence is one thing and that the claimants have not submitted any bills to the respondents for interest as required under clause 12.1.16 of the agreement and, therefore, they are not entitled to claim any interest, is another.

17. The learned Single Judge in paragraphs 21 and 22 of the order dealt with this aspect thus-

> "21. Mr.Kantawala next submitted that the Petitioners had waived the question of jurisdiction and had agreed that this was a point which could be decided by the Arbitrator. In this behalf, he points out arguments made before Arbitrator on behalf of the petitioner. He points out that before the Arbitrator it was not contended that the Arbitrator did not have jurisdiction to decide this question. He then relied upon the observations made by Division Bench of the Bombay High Court, in paragraphs 14 to 16 of Order dated 21st February 1991 in Appeal No.213 of 1988 in Arbitration Petition No.125 of 1987 in support of this submission.
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> 22. In my view, Mr.Kantawala is right. It has not even urged before the Arbitrator that he did not have

> jurisdiction to decide this question. In fact before the Arbitrator the question of interest is argued on merits. As held by the Division Bench once parties submit to the jurisdiction they cannot then say, when the Award is against them, that the Arbitrator had no jurisdiction and seek to challenge that Award on this ground."

18. We find no error in the approach of the learned Single Judge.

19. Besides that, we find that the learned Single Judge construed, the terms of reference to mean that all disputes arising under the contract dated 12th August, 1983 including the question about the amounts that were payable by one party to other having been referred to the arbitration and it included all claims between the parties including the question of interest for delay as contemplated in clause 12.1.6. The construction made by the learned Single Judge of clause 1 of the reference order dated 19th February, 1988 cannot be said to be erroneous as it is comprehensive enough to include the claim of interest for delay covered by clause 12.1.6 even if at the time the reference was made, the bills for interest as contemplated under that clause were not raised. The fact of the matter is that the claim of interest for delay is for the period anterior to the reference order dated 19th February, 1988.

20. In Wazir Chand Mahajan, the Supreme Court interalia, dealt with the question whether the claim was barred by limitation. It was observed that section 37(1) of the Arbitration Act, 1940 does not confer authority upon the Court to reject the application for filing of an arbitration agreement under section 20 of the Arbitration Act because the claim is not made within three years from the date on which the right to apply arose. The Supreme Court further observed that in dealing with an application for

filing an arbitration agreement, the court must satisfy itself about the existence of a written agreement which is valid and subsisting and which has been executed before the institution of any suit, and also that a dispute has arisen with regard to the subject matter of the agreement which is within the jurisdiction of the court.

21. In the present case it is not in dispute that the dispute between the parties had arisen and all the disputes and their claims were referred for adjudication to the sole arbitration. In the backdrop of the comprehensive and wide term of reference as contained in clause 1 of the reference order, it cannot be said that the dispute concerning the interest for delay could not have been adjudicated upon.

22. In the case of Damodar Das, the Supreme Court observed that there is no right to apply until there is a clear and unequivocal denial of that right by the other side. The judgment of the Supreme Court in the case of Damodar Das has no application to the facts of the present case where admittedly, the dispute has arisen between the parties.

23. In Inder Singh Rekhi, the Supreme Court observed that the dispute arises where there is a claim and a denial and repudiation of the claim; the existence of dispute is essential for appointment of an arbitrator under section 8 or a reference under section 20 of the Act; there should be dispute and there can only be a dispute when a claim is asserted by one party and denied by the other on whatever grounds. In the present case the reference under section 20 itself suggests and shows that the dispute between the parties have arisen and their claims for adjudication were referred for adjudication by the sole arbitrator.

24. In Kurian P. Paul, the Division Bench of Kerala High Court with reference to section 30 of the Arbitration Act, 1940 held that an arbitrator misconducts the proceedings when he acts beyond the reference and bases the award on no evidence. In this case, there is no such misconduct by the Arbitrator.

25. The Full Bench of Delhi High Court in V.P.Jolly interalia observed that where arbitrator ignores even to refer to supplemental agreement in award which prohibits grant of additional compensation and extra rates, it amounts to misconduct on his part. In the instant case the Arbitrator has referred to in clause 12.1.6 and has not travelled beyond the reference.

26. The judgment of Orissa High Court in the case of Bharat Painters holds that the award passed without any material on record amounts to misconduct and the award can be interfered with. There is no such thing in the present case. Save and except the award of interest on the ground of delay for the first 90 days which has already been interfered with by the learned Single Judge, the award cannot be said to be based on no material.

27. In M/s.Allen Berry & Co., while dealing with section 30 of the Arbitration Act, 1940, the Supreme Court held that mistake in award can be a ground of remission or setting it aside only when such mistake is apparent on the face of the case or forms a part of it. Applying the said principle, we find that save and except the mistake in award of interest for the first 90 days is concerned and that has been set aside by the learned Single Judge, there is no mistake apparent on the face of the record warranting interference.

28. In M/s.Sudarsan Trading Co., the Supreme Court held that

interpretation of contract is a matter for arbitrator. That is what has been done by the Arbitrator in the present case.

29. We, thus, find ourselves in agreement with the view of the learned Single Judge. No case for interference is made out. Appeal is dismissed with no order as to costs.

30. At this stage, Mr.K.R.Bulchandani, the learned counsel for the appellants submitted that the appellant-company is sick industrial company in asmuch as the appeal is pending before the AAIFR under the Sick Industrial Companies (Special Provisions) Act, 1985 and, therefore, the execution of the impugned decree be stayed until the proceedings before the AAIFR are concluded. This is an aspect that needs to be raised by the appellants in execution proceedings.

(R.M.LODHA, J.)

(ANOOP V. MOHTA, J.)